Supreme Court, U.S.
FILED
DEC 23 1991
OFFICE OF THE CLERK

No. 91-42

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

vs.

THERESA A. BURKE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF EQUAL RIGHTS ADVOCATES, INC., AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

NANCY L. DAVIS
MARIA BLANCO
EQUAL RIGHTS ADVOCATES, INC.
1663 Mission St.
5th Floor
San Francisco, CA 94103
(415) 621-0672

STEPHEN V. BOMSE*
JERRY H. ROBINSON
MICHELLE J. JACOBUS
LAUREL E. FLETCHER
HELLER, EHRMAN, WHITE & MCAULIFFE
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of Amicus Curiae 1

Introduction and Summary of Argument 1

Argument 1

I

The Writ Should Be Dismissed as Improvidently Granted 1

II

If the Court Elects to Decide the Case, the Judgment Below Should Be Affirmed 6

A. When an Award Is Received as a Result of a Personal Injury, It Is Exempt from Income Tax 7

B. The Nature of the Harm Redressed in a Title VII Action is a Personal Injury 10

Conclusion 15

TABLE OF AUTHORITIES

Page

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 11

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) 10

Cook v. Hudson, 429 U.S. 165 (1976) 3

Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990) 13

Redfield v. Insurance Co. of North America, 1991 U.S. App. LEXIS 17809 (9th Cir. 1991) 13

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 3

Rickel v. Commissioner, 900 F.2d 655 (3rd Cir. 1990) 13

Roemer v. Commissioner, 716 F.2d 693 (9th Cir. 1983) ..4, 13

Rudolph v. United States, 370 U.S. 269, *rehearing denied*, 371 U.S. 854 (1962) 3

Threlkeld v. Commissioner, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988) 13

Statutes and Rules

I.R.C. § 61(a) 7

I.R.C. § 104(a)(2) ..... *passim*

Pub. L. No. 102-166, § 102(a)(1) (Nov. 21, 1991) ...2, 11

Rev. Rul. 85-97, 1985-2 C.B. 50 4

Sup. Ct. Rule 37 1

42 USC § 2000e-5(g) (Civil Rights Act of 1964) 11

TABLE OF AUTHORITIES – Continued

Page

Other Authorities

Cardozo, *Mr. Justice Holmes*, 44 Harv. L. Rev. 682 (1931) 6

Henry, *Torts and Taxes, Taxes and Torts: The Taxation of Personal Injury Recoveries*, 23 Hous. L. Rev. 701 (1986) 9

Minow, *Speaking of Silence*, 43 U. Miami L. Rev. 493 (1988) 10

Morgan, *Old Torts, New torts, and Taxes: The Still Uncertain Scope of Section 104(a)(2)*, 48 La. L. Rev. 875 (1988) 9

Note, *Taxation of Damage Recoveries from Litigation*, 40 Cornell L. Rev. 345, 346 (1955) 9

Note, *Tax Treatment of Post-Termination Personal Injury Settlements*, 61 Cal. L. Rev. 1237 (1974) 9

Palmer, *Internal Revenue Code Section 104(a)(2) and the Exclusion of Personal Injury Damages: A Model of Inconsistency*, 15 J. Corp. L. 83 (1989) 9

Pierce, *Sexual Harassment and Title VII: A Better Solution*, 30 B.C. L. Rev. 1071, n.3 (1989) 10

Sheimer, *The Taxability of Judgments*, 4 UCLA L. Rev. 447, 448-49 (1957) 8

H.R. Rep. No. 102-40, Part I, 102nd Cong., 1st Sess., at 15 (1991) 12

INTEREST OF AMICUS CURIAE

Equal Rights Advocates, Inc. ("ERA") is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to secure equality for women. ERA has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. ERA has been particularly concerned with equality in the work force because economic independence is fundamental to women's ability to gain equality in other aspects of society. As Title VII is one of the foremost federal laws designed to promote equality in the workplace and protect women from the devastation of discrimination, ERA has a particularly strong interest in the interpretation and implementation of Title VII through the courts. ERA considers the taxation of Title VII recoveries to be at odds with both the intent behind and the effectiveness of Title VII as a statute to remedy the harms of gender-based discrimination.

The consent of the parties to the filing of this *amicus curiae* brief have been received. Pursuant to Rule 37, Respondent has filed a general letter of consent with the Clerk of the Court, a copy of which is included herein. Likewise, the Solicitor General has filed a letter of consent with the Court, a copy of which is also included herein.

INTRODUCTION AND SUMMARY OF ARGUMENT

On October 30, 1991, Congress passed the Civil Rights Act of 1991. The act was thereafter signed by the

President and is now law. One of the principal "purposes" of the statute, as recited in its preamble, is "to provide *appropriate* remedies" for discrimination under Title VII. Those "appropriate" remedies now include the right to recover both "compensatory" and "punitive" damages "in addition to" any other forms of relief previously available. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(a)(1) (Nov. 21, 1991) (to be codified at 42 U.S.C. § 1981).

The passage of that statute, we submit, has overriding significance for this case in two respects. *First*, we believe that it should cause the Court to dismiss the writ of certiorari as improvidently granted. Not only has the unanticipated passage of the new act diminished the potential significance of this case, but it has, in all events, rendered it an inappropriate vehicle for attempting to adjudicate the broader tax issues raised by Title VII recoveries. *Second*, passage of the new act underscores the error in the government's analysis, which fatally confuses the nature of the right with the nature of the remedy. For good reason, the former should control the tax outcome under Internal Revenue Code section 104(a)(2). While that confusion would have been evident even without the new statute, its passage makes the point manifest.

ARGUMENT

I

THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Given the limited resources of this Court, exercise of the discretionary power of review by certiorari is limited

to cases in which "there are special and important reasons" for granting the writ. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 73 (1955) " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Id.*

In light of these limits, the Court on occasion has elected to vacate a writ previously granted where intervening events make it apparent, for whatever reason, that the case should not be decided. *See, e.g., id.* Like the grant of certiorari, itself, no precise formula defines or controls the exercise of this prudential power. However, it has been used in the past where intervening legislation rendered a case of only "isolated significance." *Rice*, 349 U.S. at 76. *See also, Rudolph v. United States*, 370 U.S. 269, 270, *rehearing denied*, 371 U.S. 854 (1962) (where " . . . review [is] of no importance save to the litigants themselves . . . [t]he appropriate disposition is to dismiss the writ as improvidently granted."); *Cook v. Hudson*, 429 U.S. 165 (1976).

We submit that that course should be followed here. The petition for certiorari in this case was granted on October 29, 1991. At that time the case appeared to present (albeit in a somewhat unique factual context) a reasonable vehicle for resolving a split in Circuit Court opinions on the issue of the taxability of Title VII settlements. However, similar to the circumstances in *Rice*, after the writ was granted, the new Civil Rights act was signed into law. This act provides for compensatory damages in Title VII cases, thus dramatically altering the remedial landscape in future Title VII litigation.

The new statute should cause the writ in this case to be dismissed for two reasons. First, its passage renders the government's arguments effectively a dead letter in future cases. The essence of the government's position is that the "litigation benefits" provided for by the settlement agreement in this case are taxable because they *must*, given the limited nature of the relief sought *and available* under prior Title VII, represent solely back pay. Alternatively, the government appears to argue that the nature of the available monetary relief takes Title VII payments outside the broad ambit of "personal injury" recoveries which are excluded from income subject to tax under IRC section 104(a)(2). See pp. 6-9, *infra*.

Neither of those arguments survives the passage of the new act. Even the Internal Revenue Service has acknowledged that lump sum settlements of personal injury claims are entirely exempt even though the recoveries may include both compensatory damages and lost wages. Rev. Rul. 85-97, 1985-2 C.B. 50. No allocation is made between the two types of recovery for tax purposes. *See, e.g., Roemer v. Commissioner*, 716 F.2d 693, 696 (9th Cir. 1983). That is a settled practice in personal injury cases and the government nowhere challenges it in this case. That being so, passage of the new statute makes it a virtual certainty that the particular issue presented here – a "pure" back pay case – will arise, at best, with extremely episodic frequency in future Title VII litigation.[1]

---

[1] In suggesting that the tax issue is effectively mooted by the new act, we do not mean to suggest that the government's

(Continued on following page)

In any event, passage of the new act so alters the jurisprudential calculus applicable to the Title VII tax issue that its consideration should, at the least, be postponed to a later day. The government's brief inexplicably all but ignores the new act. Yet if the government intends to continue to attempt to solve the nation's fiscal crisis out of the pockets of discrimination victims, it will need to do so with a wholly different set of arguments than the ones it advances here. In fact, at this juncture, it is unclear just what position it might advance.

It also may be that with passage of the new statute, the current division among the circuits will evaporate, rendering the problem moot. At a minimum, there is good reason to give both the taxing authorities and the

---

(Continued from previous page)

position in this case is well-taken even under pre-existing law. As we explain in the next section of this brief, the basic thrust of the government's position is mis-conceived under pre-amendment Title VII as well as under the current law. *See* pp. 6-13, infra. Moreover, the argument that because former Title VII provided monetary recovery only in the form of "back pay" (itself an overstatement) any settlement must represent a taxable recovery of such wages is simply wrong. At the most basic level, settlements typically include some bargained for recovery of litigation expenses. More important, the remedies available under Title VII include various types of remedial benefits in the form of new work-rules or other procedures to ameliorate the effects of past violations. In a settlement, the extent and nature of those obligations become a bargaining chip, capable of being traded off for additional monetary payments. In a post-Coasian world it is therefore somewhat late as well as naive to suggest that a lump sum Title VII settlement necessarily represents simply "back pay."

lower courts an adequate opportunity to treat the consequences of the new law before having it decided by this Court. Certainly it would be "improvident" for this Court, in effect, to reach out to predetermine the consequences of a brand new law using the atypical (and now effectively historic) facts of this case as its vehicle. Two-hundred years of limiting adjudication to actual "cases and controversies" militates against that course.

One can envision tax issues that could arise under the new law. When and if they do, it may be appropriate for this Court to consider them. For the present, however, it should be sufficient to observe that at the time the government sought and was granted review in this case no one had reason to anticipate the passage of the 1991 Civil Rights bill, at least in its present form. That event having occurred, however, it is in the interest of all concerned for this Court to dismiss the present writ as having been improvidently granted.

II

IF THE COURT ELECTS TO DECIDE THE CASE, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

In his seminal article on Justice Holmes, Benjamin Cardozo referred to the dangers inherent in the "tyranny of tags and tickets," that is, the danger of substituting law by catch phrase for reasoned analysis. Cardozo, *Mr. Justice Holmes*, 44 Harv. L. Rev. 682 (1931). We submit that the government's brief in this case falls victim to that vice and, thus, urges a result that neither language nor logic can support. Taking snippets from statutes, legislative history and cases, the government manages to confuse

both tax and civil rights principles in an effort to support a result which, in fact, is supported by neither.

A. WHEN AN AWARD IS RECEIVED AS A RESULT OF A PERSONAL INJURY IT IS EXEMPT FROM INCOME TAX.

The Government's brief purports to review the legislative and judicial history which led to the current taxation scheme in cases involving personal injuries. From that history it somehow derives the controlling principle that "[f]or Section 104(a)(2) to be applicable to a recovery involving a non-physical injury to personal rights, the taxpayer . . . has the burden of establishing that the recovery is reimbursement for a prior loss of personal capital and does not represent gain or profit that instead add[s] to [her] wealth." Gov. Br. pp. 14-15. Purporting to apply that principle, the government further argues that because the measure of monetary recovery for violation of Title VII is back pay, any settlement payments represent an enhancement of wealth that fall outside of Section 104(a)(2).

With all respect, the analysis is fundamentally confused. We assume for present purposes that the award in this case was "back pay."[2] We further acknowledge that Ms. Burke's wealth was enhanced when she received those payments so that what she received falls within recognized concepts of "income" as that term is used in Section 61(a) of the Internal Revenue Code. Indeed, in a broad sense, wealth necessarily is enhanced whenever

---

[2] But see footnote 1, *supra*.

one receives money with no obligation to repay it. But the answer to the question before the Court does not rest on those matters at all, for not all "income" and not all "enhancements of wealth" are subject to our income tax. When an enhancement of wealth results from damage to one's personal rights, it is treated – as it has been since 1918 – as something that, as a policy matter, is not taxed.

The exemption established by Section 104 of the Code reflects a policy judgment that an individual does not profit (in an income tax sense) from receiving money as a result of being wronged from having his or her personal rights invaded – here, in the form of sex discrimination. The precise rationale for the section 104 exclusion has been expressed in various ways. According to one author:

> "Damage recoveries for injuries to the person or personal rights of the taxpayer are in a distinct class for income tax consideration. The underlying theory of the revenue service and the courts is that one does not make a profit from such judgments, but is compensated for personal harm. With this theory in mind, damage recoveries for physical inquiries are specifically exempted from taxation . . . although the recovery may include a replacement of earnings lost due to the injury."[3]

And another:

> "The tax treatment of personal injury recoveries under the Internal Revenue Code is based on public policy and not on strict tax logic. . . .

[3] Sheimer, *The Taxability of Judgments*, 4 UCLA L. Rev. 447, 448-49 (1957).

> Congress has exempted personal inquiry recoveries from gross income since 1918 and the same policy has been followed by the Internal Revenue Service. This reflects the humane desire not to burden those already injured, and the practical difficulty of segregating the taxable and nontaxable elements in a personal injury award, as most of these awards are in the form of unallocated sums."[4]

But whatever the rationale,[5] it is clear that the statute exempts from gross income damages resulting from personal injuries.

While the government at some points correctly articulates the relationship between Section 61(a) and Section 104(a)(2), its argument confuses the separate concepts of income and exemption. Section 61 includes in gross income all wealth enhancements unless specifically exempt. Here, Ms. Burke's wealth undeniably was enhanced by her recovery, but if the recovery meets the requirements of Section 104, it is exempt. *And whether the requirements of Section 104 are met depends not on the nature*

[4] Note, *Taxation of Damage Recoveries from Litigation*, 40 Cornell L. Rev. 345, 346 (1955).

[5] For comprehensive discussions of the rationale and issues involved in Section 104, *see also* Henry, *Torts and Taxes, Taxes and Torts: The Taxation of Personal Injury Recoveries*, 23 Hous. L. Rev. 701 (1986); Morgan, *Old Torts, New Torts, and Taxes: The Still Uncertain Scope of Section 104(a)(2)*, 48 La. L. Rev. 875 (1988); Palmer, *Internal Revenue Code Section 104(a)(2) and the Exclusion of Personal Injury Damages: A Model of Inconsistency*, 15 J. Corp. L. 83 (1989); Note, *Tax Treatment of Post-Termination Personal Injury Settlements*, 61 Cal. L. Rev. 1237 (1974).

of the recovery but on whether the amount received is on account of personal injuries or, as often articulated by the courts, on the nature of the taxpayer's injury.

B. THE NATURE OF THE HARM REDRESSED IN A TITLE VII ACTION IS A PERSONAL INJURY.

Title VII was enacted a quarter-century ago to redress widely-perceived problems of private employment discrimination on the basis of race, ethnicity, origin and gender. As various courts have recognized, such discrimination represents an "intentional assault on an individual's innermost privacy." *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981). Being treated differently based on, *e.g.*, one's gender can result in impaired job performance,[6] loss of self-esteem, and an inability to integrate into the work environment.[7]

The government argues, however, that because the monetary remedy available under Title VII generally is limited to "back pay," any "injury suffered" by a Title VII claimant "was not a personal injury but rather an injury to economic interests." Gov. Br., p. 24. The argument is not only misconceived, but backward. The nature of the injury, not the allowable recovery therefore, determines the character of the claim. The fact that Congress originally specified certain forms of relief as appropriate to

---

[6] Pierce, *Sexual Harassment and Title VII: A Better Solution*, 30 B.C.L. Rev. 1071, n.3 (1989).

[7] Minow, *Speaking of Silence*, 43 U. Miami L. Rev. 493, 499-500 (1988).

redress private employment discrimination does not alter the nature of the wrong.

What is more, it does substantial injustice to the terms of the statute to suggest that its remedial provisions were ever intended to be tightly cabined in the manner suggested by petitioner here. To the contrary, the relevant language of the statute as originally enacted provides that courts may order "reinstatment . . . with or without back pay . . . or any other equitable relief as the Court deems appropriate." 42 USC § 2000e-5(g). That language is consistent with the legislative history of the act which indicates a Congressional intention to deal broadly with the consequences of employment discrimination. This Court, similarly, has acknowledged that "the scope of relief under the Act is intended to make the victims of unlawful discrimination whole, and [that] the attainment of that objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975), *citing* 118 Cong. Rec. 7168 (1972).

Given the type of harm resulting from discrimination based on race or gender, it is disingenuous to suggest that the "nature" of a Title VII claim can be determined by the form of monetary relief available to a successful claimant. However, if there were any prior doubt on that subject it is eliminated by the recently enacted additions to Title VII which now specifically permit a victim of discrimination to recover general compensatory damages. Pub. L. No.

102-166, § 102(a)(1). As recited in section 3 of the new statute, the purpose of this amendment is to provide "appropriate" remedies for discrimination. That statement of purpose is further elaborated by the legislative history of the act which expressly analogizes employment discrimination to other intentional torts, such as "assaults, batteries . . . and other intentional injuries to people." H.R. Rep. No. 102-40, Part I, 102nd Cong., 1st Sess., at 15 (1991). The report goes on to point out that the nature of the harms caused by racial, religious or gender discrimination include such matters as "humiliation, loss of dignity, psychological (and sometimes physical) injury . . . and other consequential injuries." *Id.* at 65.

The amended law thus puts to rest any serious claim that Title VII recoveries should be treated differently under Section 104(a)(2) than other forms of personal injury. At the most basic level, the availability of compensatory damages entirely undermines the government's technical argument that because Title VII did not previously provide for monetary relief other than back pay, no Section 104(a)(2) exemption is available.

More fundamentally, the new amendments knock the intellectual props out from under the government's attempt to determine the "nature" of a Title VII claim by reference to the remedy, rather than the right that is in issue. The change in the remedial provisions of Title VII to assure that "appropriate" relief is available was made without in any way altering the substantive provisions of Title VII that establish the nature of the wrong. But it is that wrong (and the types of harm foreseeably flowing therefrom) which defines the character of a Title VII claim

and – in accordance with established principles,[8] unchallenged by the government here – makes applicable the Section 104 exemption.[9]

Finally, we would note two additional points to underscore the appropriateness of the result reached below. First, the government's argument that excluding back pay damages will render a Title VII plaintiff "better off" than if she had never been discriminated against in the first place is not only irrelevant in light of the clear statutory policy but is, in any event, unpersuasive (and at least modestly offensive). It ignores the fact that the indelible effects of discrimination extend well beyond the reach of *any* form of compensation, whatever its nature or amount. In fact, the idea that money can ever make the victim of a serious tort "whole" is a fiction, necessary to the law but untrue in fact. While money is paid to tort victims as the only (or best) available surrogate for the harm visited upon them, few people would voluntarily trade an arm or leg for any amount of compensation.

---

[8] *E.g., Pistillo v. Commissioner*, 912 F.2d 145, 150 (6th Cir. 1990); *Rickel v. Commissioner*, 900 F.2d 655, 661 (3d Cir. 1990); *Redfield v. Insurance Co. of North America*, 1991 U.S. App. LEXIS 17809 (9th Cir. 1991); *Threlkold v. Commissioner*, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988).

[9] The fact that many future Title VII recoveries will continue to include damages for lost wages has no bearing on the tax issue here any more than it does in cases involving physical injuries or other torts, such as defamation, in which the injury is non-physical but the harm in part consists of lost professional opportunities. *See, e.g., Roemer v. Commissioner*, 716 F.2d 193; Rev. Rul. 85-97, 1985-2 C.B. 50. The government does not challenge these well-established principles of non-allocation in this case.

Equally few would exchange the right to be employed in a discrimination-free work environment for a tax-free damage award. The "better off" argument also ignores the important fact that litigation imposes heavy transaction costs and that most cases are settled at some compromise amount thus providing the plaintiff far less than the full amount he or she would have earned but for the challenged discrimination.

Second, from a policy standpoint, permitting Title VII recoveries to be excluded from income will facilitate the settlement of such litigation by permitting settlement payments to be received free from federal income tax. Further, it will avoid any perceived need to characterize or allocate components of a settlement as between "back pay" and other forms of recovery. Since many Title VII cases are brought as complex class actions, the potential benefit to over-crowded federal court dockets adds at least some additional weight to the more compelling arguments noted above.

CONCLUSION

For the foregoing reasons, the writ of certiorari in this case should be dismissed as improvidently granted. Alternatively, the judgment below should be affirmed.

Dated: December 23, 1991

Respectfully submitted,

NANCY L. DAVIS
MARIA BLANCO
EQUAL RIGHTS ADVOCATES, INC.
1663 Mission St.
5th Floor
San Francisco, CA 94103
(415) 621-0672

STEPHEN V. BOMSE*
JERRY H. ROBINSON
MICHELLE J. JACOBUS
LAUREL E. FLETCHER
HELLER, EHRMAN, WHITE & MCAULIFFE
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

*Counsel of Record

Attorneys for Equal Rights Advocates, Inc. Amicus Curiae